Filed 12/3/04 Nemeth v. Heer CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LESLEY NEMETH, Plaintiff and Appellant, v. LAURENCE V. HEER, Defendant and Respondent.	H026786 (Santa Clara County Super. Ct. No. CV810154)

Plaintiff Lesley Nemeth, found by an arbitrator to be 50 percent responsible for her injuries from an automobile accident with defendant Laurence V. Heer, appeals from denial of her post-judgment motion to set aside the judgment after she failed to timely file her request for a trial de novo.

FACTS

Plaintiff filed her complaint for damages for personal injury and property damage from a motor vehicle accident on August 8, 2002, alleging that on October 29, 2001, defendant made a negligent turn causing his vehicle to collide with plaintiff's. The matter went to arbitration on May 21, 2003, and after a "lengthy" hearing, the arbitrator found that plaintiff was 50 percent negligent and awarded her $21,143.37 plus statutory costs. The award was filed May 27, 2003.

A post arbitration request for trial de novo must be served and filed within 30 days of the filing of the arbitrator's award. (Code Civ. Proc., § 1141.20; Cal. Rules of Court,

rules 1615(c), 1616(a), hereafter rule.)[1] In this case, 30 days fell on June 26. Plaintiff's counsel served her request for a trial de novo on defendant on June 25, 2003, by fax and by mail. On Monday, June 30, 2003, plaintiff filed her request for a trial de novo. This request was deemed to be untimely filed and notice of entry of judgment was filed and served by the court on July 25, 2003.

Thereafter, plaintiff's counsel filed a motion to vacate entry of judgment. It was based on the grounds that the rejection of the arbitration award and the request for a trial de novo was timely filed under *Domingo v. Los Angeles County Metropolitan* (1999) 74 Cal.App.4th 550 (*Domingo*), which plaintiff's counsel claimed held that "the court lacks jurisdiction to enter judgment 'until the parties are served or otherwise obtain actual notice of the award,' " and that plaintiff's counsel relied on his mistaken but good faith belief that the 30 days for filing the rejection of the award and request for trial de novo ran from the date of actual receipt of the award by plaintiff's attorney. Counsel filed a declaration under penalty of perjury that the arbitrator's award arrived in his office mail on May 29, 2003, and that he mistakenly believed that the court received and filed the award that same day and that therefore he believed that the 30 days for the filing of plaintiff's rejection started running on May 29, 2003, and that therefore a filing of the rejection on June 30, 2003, would be timely. A hearing was held on September 25, 2003. The court clarified that the *Domingo* case involved an absence of proper service and denial of the motion was filed on October 3, 2003.

On October 14, 2003, plaintiff filed an application to have the trial court exercise its inherent power to correct the order which he claimed was erroneous because "[t]his Court ruled, consistent with Defendant's argument, that it did not have any discretion to grant such relief even if relief were justified." When the hearing was held on November

[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

18, 2003, the court stated that plaintiff's counsel misinterpreted the order because, although counsel cited mistake, inadvertence, and excusable neglect, "[t]he circumstances in this case did not qualify for that relief." In spite of defendant's being served by fax in a timely fashion, the court stated, "the law is real clear, and there has to be the filing of the request for [a trial] de novo [in the court] within the time limit."

At that time, and for the first time, plaintiff's counsel told the court that he had gone to the clerk's office on June 26 at about 3:45 p.m. to file the request for a trial de novo. After waiting in line, he was told at 3:59 that he was in the wrong line and he had to "file that next door." When he arrived at the correct room, "[t]hey were just locking the doors to the main filing room." He went down the hall and in through another door. A "supervisory clerk" accused counsel of having entered through the wrong door in an untimely fashion because "they locked the primary door. Even though I got there on time in the line with two people in front of me, the supervisor stood up and accused me of having entered the room inappropriately un--not untimely. I pointed to the clock. At that time it was only 2 seconds after 4:00. I was in that line at 4 o'clock, Your Honor. We--there was a heated discussion about whether or not it was the time that was important or whether or not it was what door I came through. Then he threatened to call the deputies in from the hallway to have me escorted from the building or worse. [¶] At that point, I gave up on it and said okay I'll leave. So I departed." On June 27, counsel started researching the matter "because I didn't know that I was not timely."

Defense counsel interjected that he found it "difficult to imagine that none of this was brought up with the original motion. [¶] It was a very lengthy declaration that was filed, which not only failed to raise any of these facts that counsel is alleging now, but said things quite the opposite. [¶] In the original declaration, [plaintiff's counsel] said, under penalty of perjury, that he received the arbitration award on May 29th and said only that he filed his request for trial de novo on June 30th with no explanation. [¶] In fact, the only explanation he gave, he said he read the *Domingo* case and came to the

conclusion, erroneously, that he had additional time to file his request for trial de novo. And that was under a mistake of law. [¶] Now, it is very strange this is the first time we hear some argument with the clerk about trying to file it on June 26th."

The trial court obtained a description of the clerk and the particular section of the clerk's office that plaintiff's counsel was talking about and then said, "I want to find out what happened," although "[t]he timing of raising this issue is troublesome. . . . I should be looking at [this] at the very beginning when you're making your motion as opposed [to] here before the other side has had no opportunity to respond to that." Plaintiff's counsel acknowledged that "this sounds lame," but that he based his argument on *Domingo* so he "wouldn't have to expose that particular ineptitude."[2] The trial court took the matter under advisement, conducted an investigation, and denied the motion. In its order, the court stated that the reasons for plaintiff's failure to timely file the request did not qualify for discretionary relief and the motion was denied on the merits under section 473. In addition, the court stated it made inquiries of four male clerks in the clerk's office who "potentially could have been involved. None of them completely match the description. These inquiries failed to confirm [plaintiff's counsel's] description of the encounter. The court spoke directly with all of these clerks. None of them remembered this encounter. Further, all said that they would have tried to work out such a dispute. [¶] Nowhere in any paper filed in pursuit of the effort to vacate the judgment is there any mention of this encounter. The court is uncertain what conclusion to reach from this, but based on all of the evidence in this file, the application is denied." This appeal ensued.

[2] Plaintiff's opening brief claims that "[t]here is a reasonable explanation as to why counsel did not recount the filing attempt in any declaration." Counsel erroneously relied on *Domingo*, *supra*, 74 Cal.App.4th 550, was "inexperienced in civil matters; the instant matter is his only automobile accident case," and he was embarrassed about "the aborted attempt to file the request for trial de novo."

ISSUES ON APPEAL

Plaintiff contends first, that she substantially complied with all the requirements for filing the request for trial de novo; that defendant was not prejudiced, and therefore, the order denying the motion to vacate entry of judgment should be reversed, and second, that the trial court abused its discretion when it denied the motion to vacate judgment. Defendant counters that this court lacks jurisdiction over the appeal because plaintiff failed to move to vacate the underlying judgment and that the trial court did not abuse its discretion.

JURISDICTION

Defendant asserts that the right to appeal is controlled by statute (*Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 785) which generally is contained in section 904.1. He states there is "no provision for direct appeal from *entry* of judgment." (Original italics.) Plaintiff responds that she has not appealed from entry of judgment, but from the denial of her post-judgment motion to vacate the judgment because of inadvertence, mistake, etc., pursuant to section 473.

"If there is no request for a de novo trial and the [arbitration] award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and it may not be attacked or set aside except as provided by Section 473, 1286.2, or Judicial Council rule." (§ 1141.23.) Plaintiff proceeded, in substance as well as in form, to rely on section 473 for relief, claiming that her counsel failed to timely file her rejection of the award and request for the trial de novo because of mistake, inadvertence, surprise, and excusable neglect. Indeed, the court ruled that "[p]laintiff's motion was denied on the merits under CCP § 473."

In addition, *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 609-610, held that when a request for a trial de novo is filed after judgment is entered on the arbitration award, there is no appeal. However, an appeal may be taken from an order denying a

motion to vacate that judgment. Defendant's claimed belief that plaintiff appealed from denial of *entry* of judgment and not denial of a motion to vacate judgment is belied by his statements in his responsive papers to plaintiff's motions. In opposition to her motion captioned "Notice of Motion and Motion to Vacate the Entry of Judgment in Conformance With the Arbitration Award Filed Herein Based on Mistake, Inadvertence or Excusable Neglect [CCP § 473(b)] and Motion for Order that This Matter be Reset on the Civil Action List" (brackets original), he stated, "[t]here is simply no explanation . . . why plaintiff waited 40 days after the hearing and 34 days after the filing of the award to file his [*sic*] request. The *motion to vacate judgment* should be denied." (Italics added.) In his opposition to plaintiff's later motion to have the court correct its "legally erroneous order" he refers to "the court's order denying her earlier *Motion to Vacate Judgment.*" (Italics added.) Later in the opposition, he states, "[a]gain referring to plaintiff's *Motion to Vacate Judgment*," (italics added) and even later "(Plaintiff's *Motion to Vacate Judgment*; . . .)." (Underscoring original, italics added.) It is clear that defendant was not confused by plaintiff's counsel's captioning. Plaintiff wanted the judgment vacated and a trial de novo on the issues. The order denying the motion is appealable.

SUBSTANTIAL COMPLIANCE

Plaintiff asserts that since she served defendant in a timely manner with a copy of her rejection of the arbitration award and request for a trial de novo, the four-day-late filing did not prejudice defendant or the court and she substantially complied with all requirements regarding notice. Plaintiff relies on *Hanf v. Sunnyview Development*, *Inc.* (1982) 128 Cal.App.3d 909, 916 (*Hanf*), for the proposition that the "purpose of the 20-day limitation [which runs 30 days (rules 1615(a) and 1616(a), as amended Jan. 1, 1985)] imposed by section 1141.20 and rules 1615(a) and 1616(a) is served by a . . . form of notice which, in substance, promptly and adequately informs both the court and any adverse party of the intent to elect a trial de novo."

Section 1141.20, subdivision (a), states, "An arbitration award shall be final unless a request for a de novo trial is filed within 30 days after the date the arbitrator files the award with the court." The 30-day period within which to request trial may not be extended. (Rule 1616(a).) "From this specific prohibition against extending time, and the lack of any authorization to shorten time, we conclude that a trial court has no authority to alter the time in which a party must file a request for a de novo trial." (*Karamzai v. Digitcom* (1996) 51 Cal.App.4th 547, 551.)

The *Hanf* court stated, however, "We find nothing in section 1141.20 or the applicable Rules of Court to indicate that only strict compliance will be tolerated. On the contrary, since the purposes and policies of the laws may be satisfied by substantial compliance, we adopt that test here. [Citations.]

" ' "Substantial compliance, as the phrase is used in decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute," as distinguished from "mere technical imperfections of form." ' [Citations.] Here, appellants' "Rejection of Arbitrator's Award" [which was timely served on the opposing party and filed with the court, followed by a separate request for a trial de novo which was timely served but filed two days late] sufficiently alerted both the trial court and respondents to appellants' election under [rules] 1615(c) and 1616(a) to take the case to trial. It was promptly filed and its intent was clear. We thus conclude that the rejection substantially complied with the rules governing a request for a trial after arbitration, making the trial court's entry of judgment erroneous." (*Hanf*, *supra*, 128 Cal.App.3d at p. 916.)

The adverse party receives notice that he cannot rely on the arbitration award by service of the rejection of the arbitrator's award and a request for a trial de novo. (*Lum v. Mission Inn Foundation*, *Inc.* (1986) 180 Cal.App.3d 967, 972; rules 1615(c), 1616(a).) "The court, of course, is notified by the filing of the request." (*Lum v. Mission Inn Foundation*, *Inc.*, *supra*, 180 Cal.App.3d at p. 972.) In the instant case, defendant

received timely service of plaintiff's request for a trial de novo but the court did not. The request for a trial de novo was filed four days late. An arbitration award shall be final unless a request for a de novo trial is filed within 30 days after the arbitrator files the award with the court. (§ 1141.20, subd. (a); rule 1616(a).) The 30-day period may not be extended. (Rule 1616(a).) There is no provision authorizing the court to shorten the time within which a party may request a de novo trial. (*Karamzai v. Digitcom*, *supra*, 51 Cal.App.4th at p. 551.)

The four-day-late filing was not substantial compliance with the statute. "Substantial compliance will suffice if the purpose of the statute is satisfied [citation] but substantial compliance means *actual* compliance in respect to that statutory purpose. [Citation.] The doctrine of substantial compliance excuses technical imperfections only after the statutory objective has been achieved. [Citation.]" (*Smith v. Board of Supervisors* (1989) 216 Cal.App.3d 862, 874-875.) Plaintiff's reliance on *Hanf*, *supra*, 128 Cal.App.3d 909 is misplaced also. There, appellants had timely served and filed a "Rejection of Arbitrator's Award." A separate request for a "Trial De Novo" was timely served but was filed two days late. The reviewing court held that substantial compliance was sufficient, because appellants had given the court prompt notice by rejection of the arbitrator's award that they wished to proceed to trial. (*Hanf*, *supra*, 128 Cal.App.3d at p. 916.)

Finally, *Domingo*, *supra*, 74 Cal.App.4th 550 is also inapplicable. In *Domingo*, appellant was not properly served with the arbitrator's award. In that situation, "appellant's 30 days for filing a request for trial de novo did not begin until appellant received actual notice of the arbitrator's award." (*Id*. at p. 554.) Here, plaintiff was properly served with the award on May 27 and had 30 days from service to file her request for a trial de novo.

EXCUSABLE NEGLECT, MISTAKE, INADVERTENCE

The next question is whether counsel's failure to timely file the request for a trial de novo was caused by excusable neglect, mistake, surprise, or inadvertence. (§ 473, subd. (b).) This issue arises from plaintiff's counsel's verbal declaration to the court at the November 18, 2003 hearing, that an employee of the clerk's office frustrated his attempt to file plaintiff's request for a trial de novo on June 26 when he was told he was in the wrong line a minute before the doors were locked. Counsel went to the next room, but was told by a "supervisory clerk" that he had not been in line on time and during a "heated discussion," the clerk insisted he leave or he would be escorted from the building. The court questioned counsel about the appearance of the clerk with whom he spoke and said "I want to find out what happened. [¶] . . . [¶] . . . I haven't decided what my ruling is going to be."

Some time later, the trial court made inquiries in the clerk's office and discovered there were "four male clerks who potentially could have been involved. None of them completely match the description. These inquiries failed to confirm [plaintiff's counsel's] description of the encounter. The court spoke directly with all of these clerks. None of them remembered this encounter. Further, all said that they would have tried to work out such a dispute." The record does not disclose what inquiries were put to the witnesses and whether the witnesses could have been more forthcoming if their recollections were refreshed by the sight of plaintiff's counsel or other memory aids. The record also does not establish whether the court attempted to verify counsel's timely contact with the clerk who directed him to a different window at 3:59 p.m.

The trial court may " 'relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' While the motion lies within the sound discretion of the trial court, 'the trial court's discretion is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of

substantial justice.' [Citation.] The law strongly favors trial and disposition on the merits. Therefore, any doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343; § 473, subd. (b).)

" 'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.' [Citation, italics added.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.] [¶] The party seeking relief under section 473 must also be diligent. [Citation.] Thus, an application for relief must be made 'within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.' (§ 473, subd. (b).) [¶] Where the mistake is excusable and the party seeking relief has been diligent, courts have often granted relief pursuant to the discretionary relief provision of section 473 if prejudice to the opposing party will ensue. [Citations.] In such cases, the law 'looks with [particular] disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or

neglect of his adversary.' [Citation.]" (*Zamora v. Clayborn Contracting Group*, *Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).)

In the instant case, plaintiff's counsel's account of the contretemps at the clerk's office, if believed, is a mistake " 'anyone could have made.' " (*Zamora*, *supra*, 28 Cal.4th at p. 258.) It is clear from the record, however, that the court and opposing counsel were skeptical of the explanation because its first mention was at the end of a losing argument rather than as the initial basis for relief. In assessing counsel's veracity, the trial court clearly wanted corroboration of his claim. Unfortunately, the trial court contacted the potential witnesses personally.

"The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs." (Evid. Code, § 775.) Other than in the Small Claims Act (see Code Civ. Proc., § 116.520, subd. (c)), there is no statute that we know of that authorizes the court to informally and personally contact witnesses, take evidence from them, and investigate the matter privately. (*People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 32.) Certainly, an independent investigation by a trial judge is problematic: "there is a danger that the investigation will be truncated, preventing the presentation of other equally relevant, yet conflicting evidence. Unilateral investigation by a trial court, although consistent with the role of an advocate, appears contrary to the primary responsibilities of a neutral judicial officer." (*Ibid*.)

Here, if any part of the court's out of court inquiry formed the basis of its decision, the parties must be afforded the opportunity to participate in an evidentiary hearing on the issue. In denying the motion, however, the court stated: "based on all of the evidence in this file, the application is denied." Because the court's investigation was not "evidence

in this file" and it is unclear whether the court considered plaintiff's attorney's statement and its own inquiry in making its ruling, the matter must be remanded for the court to clarify whether its decision in denying the motion was based solely on the facts contained in the pleadings and papers, or whether it was based, at least in part, on the court's own inquiry. If the former is the case, the decision may stand; if the latter is the case, the court must conduct an evidentiary hearing concerning those additional facts, on notice to the parties to permit their participation.

Thus, we will reverse the order denying the motion to vacate and remand the matter for the court to clarify whether its decision in denying the motion was based solely on the facts contained in the pleadings and the papers, whether it was based on the facts contained in the pleadings and the papers and the statement of plaintiff's counsel, or whether it was based, at least in part, on the court's own inquiry. If either of the former is the case, the decision may stand; if the latter is the case, the court must conduct an evidentiary hearing concerning those additional facts, on notice to the parties to permit their participation.

DISPOSITION

The order denying the motion to vacate is reversed and the matter is remanded for proceedings consistent with this opinion.

Premo, Acting P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Walsh, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.